International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-03-67-T

Date: 11 November 2014

Original: ENGLISH
French

**IN TRIAL CHAMBER III**

**Before:** **Judge Jean-Claude Antonetti, Presiding**
**Judge Mandiaye Niang**
**Judge Flavia Lattanzi**

**Registrar:** **Mr John Hocking**

**Order of:** **11 November 2014**

**THE PROSECUTOR**

**v.**

**VOJISLAV ŠEŠELJ**

***PUBLIC***

# DISSENTING OPINION OF JUDGE MANDIAYE NIANG TO THE ORDER ON THE PROVISIONAL RELEASE OF THE ACCUSED *PROPRIO MOTU*

**The Office of the Prosecutor**

Mr Serge Brammertz
Mr Mathias Marcussen

**The Accused**

Mr Vojislav Šešelj

1. It is with regret that I must distance myself from the decision to grant provisional release to the Accused Vojislav Šešelj. This regret is all the greater since the initial approach was unanimous. The Accused is gravely ill. We know this despite his refusal to allow his medical file to be disclosed officially. We also know that he has not received the best care, not because it is not available, but because of a serious disagreement with the care-givers on the medical procedure. We were not responsible for this contentious issue but the consequences have not left us indifferent.

2. From June 2014, we therefore had consultations with a view to provisional release *proprio motu* of the Accused. This approach, which was a precedent in the Tribunal's practice, failed because of the Accused's refusal to commit in clear terms to respecting the measures that the Chamber intended to impose on his provisional release.

3. Recent information substantiating a possible deterioration of the health of the Accused has led us to reopen the provisional release file. Serbia, which would be the receiving country, was once again consulted by the Chamber, in accordance with Rule 65 of the Rules of Procedure and Evidence, to provide guarantees of reappearance before the court and the protection of witnesses before the provisional release. As it had done previously, Serbia agreed to receive the Accused and to implement all the restrictive measures that the Chamber would order for him. Serbia nevertheless asked that the Accused formally confirm that he will respect these conditions.

4. The majority, no doubt fearing a deadlock in view of the earlier attitude of the Accused, did not deem that it had to consult the Accused again. It was satisfied to declare its trust that "the Accused will comply with the aforementioned requirements", that is, that he will "not [...] influence witnesses and victims and [will] appear before the Chamber as soon as it so orders".

5. I have my own doubts about the effectiveness of this formula that has a hint of incantation. These doubts affected our consensus.

6. When the Accused Šešelj was consulted for the first time in June on a possible provisional release *proprio motu*, he expressed his criticism of the current authorities

of his country whose guarantees he said he did not recognise. He said that the only restriction to which he would adhere would be to remain within the confines of the territory of Serbia. He did not mention anything about his possible attitude towards witnesses in this case or about his return before the Chamber when he is required to return. In other words, we do not know what will be the Accused's response to the key points on which we intend to impose certain restrictions for his provisional release.

7. The Accused's position was not, however, an indication of a lack of interest in provisional release. In addition to the rant against the Serbian authorities and the Tribunal, the Accused also expressed a very concise legal criticism of the Chamber. He reproached it with having failed in its obligation to hold regular status conferences as set out in Rule 65 *bis* of the Rules of Procedure and Evidence. He added that this status conference would have been a platform for the Accused to address the Chamber and bring up, among other matters, his health and the conditions of his detention. He concluded that he was denied this right.[1]

8. The question of holding a status conference after the close of the case divides the judges. It is my opinion that in view of the circumstances of our case, such a conference would have been an appropriate framework to enter into dialogue with the Accused about his health and any potential conditions accompanying his provisional release.

9. Not only did we miss out on this opportunity but we did not create any others where we could hear the Accused on the question of the protection of witnesses or his reappearance before the court when required to return. Why be content with a statement of trust, as was done by the majority, when we have the possibility of checking whether the Accused will adhere or not to our conditions and we can then apply, if need be, alternative measures?

10. It is also regrettable that the decision by the majority places the Serbian authorities in an uncomfortable and awkward position. The Chamber sought the

[1] "Professor Vojislav Šešelj's Response to the Order of Trial Chamber III of 13 June 2014 Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused *Proprio Motu*", page 2, paragraph 1.

opinion of Serbia. It provided one, specifying that its cooperation was conditional on the Accused confirming that he will adhere to the Chamber's conditions. By choosing not to consult the Accused, the majority remains vague and this may in the future make Serbia's cooperation unfeasible. Has Serbia's status been relegated to a simple observer or a witness to the behaviour of the Accused after his provisional release? On the contrary, should it not have the role of a conscientious participant that helps the Tribunal to ensure that the restrictions imposed on the Accused are fully complied with? We do not know. Or perhaps we know all too well, since the majority did not order any "monitoring" mechanism, which the Tribunal regularly imposes to ensure that the witnesses are not contacted or threatened and that the Accused returns to the Tribunal when required. Even a system of communication with the Accused after his provisional release, if only to serve him with procedural acts, was not set up.

11. At a push, it may have been conceivable, if not to consult the Accused, then to impose at least a list of direct obligations for Serbia to monitor the Accused and to ensure in this way the protection of witnesses and the return of the Accused, but without his consent. Such a decision would have certainly been tricky for Serbia to implement. However, it would have had the benefit of being practicable in that it would have clearly defined the roles. However, now, apart from the order associated with not handing over the passport, there is no other direct obligation, either positive or negative, that weighs on Serbia.

12. Perhaps we should just hope that the certainty of the majority "that the Accused will comply with the [ordered] requirements" will be confirmed. Hope, however, seems to me fairly derisory comfort for the witnesses in a case which has the distinctive characteristic of having seen several allegations of interference with witnesses and even judgements convicting the Accused of having compromised the safety of protected witnesses.

13. In conclusion, while I am in favour of the provisional release of the Accused, I would not have taken such a measure without putting in place practical measures that would have allowed Serbia to assist the Tribunal to ensure, with or without the collaboration of the Accused, that he would not place in danger any witnesses and would appear before the Tribunal when required to do so.

Done in English and in French, the French version being authoritative.

/signed/
Mandiaye Niang
Judge

Done this eleventh day of November 2014
The Netherlands

**[Seal of the Tribunal]**